

UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH CAROLINA
GREENVILLE DIVISION

Super Duper, Inc. d/b/a Super Duper Publications,

CASE NO. 6:07CV375

Plaintiff,

v.

Penn National Mutual Casualty Insurance Company,
Travelers Indemnity Company, and Travelers Property
Casualty Company,

**CONSENT
AMENDED
SCHEDULING ORDER**

Defendants.

Defendants The Travelers Indemnity Company of America and Travelers Property Casualty Company of America, (incorrectly pled as Travelers Indemnity Company and Travelers Property Casualty Company) (collectively, "Travelers") by and through their attorneys, Barnwell Whaley Patterson & Helms, LLC, Defendant Penn National Mutual Casualty Insurance Company, by and through its attorneys Clawson & Staubes, LLC, and Plaintiff Super Duper, Inc., d/b/a Super Duper Publications, by and through its attorneys Covington, Patrick, Hagins, Stern & Lewis, hereby respectfully submit this joint report in response to this Court's Order of December 8, 2009 requiring the filing of a joint proposed amended scheduling order:

WHEREAS, the Parties filed a Joint Amended Scheduling Report on October 16, 2009 wherein they agreed and stipulated that the only claim in this action ripe for adjudication is plaintiff's claim for declaratory relief as to Defendants' alleged duty to defend Plaintiff in connection with an underlying counterclaim of Mattel, Inc. alleging trademark infringement and

related offenses filed in an action captioned as Super Duper, Inc., dba Super Duper Publications v. Mattel, Inc., Case no. 6:05 1700-HFF (the “Underlying Action”); and

WHEREAS, upon consent of the parties, this Court’s Order of October 19, 2009, dismissed without prejudice and with leave to re-file all of Plaintiff’s claims except Plaintiff’s claim for declaratory relief with respect to Defendants’ alleged duty to defend; and

WHEREAS, the only claim currently pending before the court is Plaintiff’s claim for declaratory relief as to Defendants’ alleged duty to defend in connection with the Underlying Action; and

WHEREAS, this Court’s Order of December 8, 2009 directs that the Parties’ joint proposed amended scheduling order include a jury selection deadline of no later than March 1, 2009; and

WHEREAS, while Plaintiff originally requested a jury trial when it filed its complaint, given that the only claim presently pending before the Court is Plaintiff’s claim for declaratory relief as to the alleged duty to defend, Plaintiff hereby agrees to withdraw its request for a jury trial; and

WHEREAS, all Parties agree that under established and controlling South Carolina law, Plaintiff’s declaratory judgment claim as to the duty to defend issue is a claim appropriately decided by the Court as a matter of law. See City of Hartsville v. S.C. Mun. Ins. & Risk Fin. Fund, 382 S.C. 535, (S.C. 2009) (Court evaluates duty to defend based on allegations of underlying complaint and extrinsic facts known by insurer); Collins Holding Corp. v. Wausau Underwriters Ins. Co., 379 S.C. 573, 579 (S.C. 2008) (**duty to defend** decided as a matter of law

on summary judgment); USAA Prop. & Cas. Ins. Co. v. Clegg, 377 S.C. 643, 661 (S.C. 2008) (court decides duty to defend as a matter of law based upon comparison of insurance policy(ies) with allegations of complaint and additional facts known to insurer); State Farm Fire & Cas. Co. v. Breazell, 324 S.C. 228, 232 (S.C. 1996) (upholding summary judgment ruling on insurer's duty to defend); Greenville County v. Insurance Reserve Fund, 313 S.C. 546, 549 (S.C. 1994) (ruling on duty to defend as a matter of law); Snakenberg v. Hartford Casualty Ins. Co., 299 S.C. 164, (S.C. Ct. App. 1989) (duty to defend determined as a matter of law at summary judgment). See also St. Paul Reinsurance Co. v. Riviello, 296 Fed. Appx. 377, 380 (4th Cir. 2008) (duty to defend determined as a matter of law); Am. Modern Home Ins. Co. v. Reeds at Bayview Mobile Home Park, LLC, 176 Fed. Appx. 363, 367 (4th Cir. 2006) (same); National Fruit Prod. Co. v. Fireman's Fund Ins. Co., No. 98-1471, 1999 U.S. App. LEXIS 8417, *16 (4th Cir. May 4, 1999) (affirming ruling on duty to defend as a matter of law); Gates, Hudson & Assocs. v. Federal Ins. Co., 141 F.3d 500, 503(4th Cir. 1997) (same); Union Ins. Co. v. Soleil Group, Inc., No. 07-CV-3995, 2009 U.S. Dist. LEXIS 83770, *22 (D.S.C. May 13, 2009) (determining duty to defend as a matter of law); and

NOW, THEREFORE, the Parties hereby report to the Court and stipulate and agree as follows:

1. Plaintiff withdraws its request for a jury trial in connection with its claim for declaratory relief as to Defendants' alleged duty to defend in connection with the Underlying Action.

2. All parties agree that Plaintiff's declaratory judgment claim as to the duty to defend issue is to be decided by this Court as a matter of law;

3. In conjunction with the Parties' agreement, all Parties further agree to and request the restructuring of this action so that this Court decides Plaintiff's declaratory judgment claim as to the duty to defend issue as a matter of law via motion practice.

4. The Parties stipulate and agree to, and respectfully request that the Court enter, an amended scheduling order as follows:

- a. The Parties shall confer and participate in a mediation conference with an agreed upon mediator by January 22, 2010.
- b. All discovery bearing on Defendants' purported duty to defend Plaintiff shall be completed on or before January 15, 2010.
- c. Dispositive motions on the duty to defend issue shall be filed no later than January 29, 2010. Responding briefs shall be filed no later than February 12, 2010. Reply briefs shall be filed no later than February 19, 2010.
- d. To the extent the Court desires to hear oral argument on the summary judgment motions, the argument will be scheduled on or before March 1, 2010.

5. The Parties stipulate and agree that upon disposition of the duty to defend issue, in the event the Court determines that disposition to be a non-final judgment, they will consent to entry of final judgment as to the duty to defend issue under Federal Rule of

Civil Procedure 54(b) so as to permit an immediate appeal of that issue and further permit this Court to close this case.

Upon agreement of the parties, the Court hereby incorporates these agreed upon dates as the Court's Amended Scheduling Order. **IT IS SO ORDERED.**

This 14th day of December, 2009.

s/Henry F. Floyd

Henry F. Floyd

United States District Judge

Respectfully submitted,

Date: December 11, 2009

s/ John W. Fletcher

M. Dawes Cooke, Jr.

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The Travelers Indemnity Company of America

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Date: December 11, 2009

s/ Timothy A. Domin

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s/ Eugene C. Covington, Jr.

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